

FILED

AUG 23 2012

POSTED ON WEBSITE  
NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 09-91686-D-13  
)  
STEVE DUROSSETTE and )  
JILL DUROSSETTE, )  
)  
Debtors. )

TRUSS DESIGN AND MANUFACTURING, ) Adv. Pro. No. 09-9068-D  
INC., A/K/A TRUSS DESIGN & )  
MANUFACTURING, INC., ) Docket Control No. JLP-7  
)  
Plaintiff, )  
)  
v. )

STEVEN L. DUROSSETTE, A/K/A ) DATE: March 8, 2012  
STEVE DUROSSETTE, AND JILL ) TIME: 10:00 a.m.  
DUROSSETTE, ) DEPT: D  
)  
Defendants. )

**This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.**

**MEMORANDUM DECISION**

On December 27, 2011, plaintiff Truss Design & Manufacturing, Inc. (the "plaintiff") filed a Notice of Motion and Motion Seeking an Award of Attorneys' Fees and Costs Following Trial, Docket Control No. JLP-7 (the "Motion"). By way of the Motion, as thereafter supplemented, the plaintiff seeks

1 \$84,525.83 in attorney's fees, \$2,108.30 in costs,<sup>1</sup> and  
2 \$12,614.39 in expert witness fees, to be awarded in favor of the  
3 plaintiff as the prevailing party in this adversary proceeding.  
4 The plaintiff's counsel is Pagano & Kass, APC ("Counsel").  
5 Defendants Steve Durossette and Jill Durossette did not file  
6 opposition to the Motion. For the reasons set forth below, the  
7 court will grant the Motion in part.

#### 8 I. BACKGROUND

9 On October 18, 2011, this court issued a judgment in this  
10 adversary proceeding in the amount of \$300,000 in favor of the  
11 plaintiff and against the defendants, and ordered that the  
12 judgment is nondischargeable. The judgment referred to the  
13 promissory note at issue in this proceeding as "contain[ing] a  
14 provision that awarded attorneys' fees and reasonable costs of  
15 suit to the prevailing party . . . ." The judgment also included  
16 a statement that the plaintiff had prevailed in the proceeding.  
17 The Motion followed.

#### 18 II. ANALYSIS

19 This court has jurisdiction over the Motion pursuant to 28  
20 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding  
21 under 28 U.S.C. § 157(b)(2)(I).

22 / / /

23 / / /

24  
25  
26 1. An amended notice filed March 6, 2012 refers to the  
27 amount of costs requested as \$5,244; however, it is clear from a  
28 supplemental declaration filed January 17, 2012 that the \$5,244  
figure represents attorney's fees "for services that have yet to  
be billed to Plaintiff." There is no other indication in the  
record that the amount of requested costs is anything other than  
\$2,108.30.

1 A. Standards for Award of Attorney's Fees in Dischargeability

2 Action

3 Since the decision of the Supreme Court in  
 4 Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.,  
 5 549 U.S. 443, 127 S. Ct. 1199, 167 L. Ed. 2d 178  
 6 (2007), the allowance of claims for attorney's fees in  
 7 bankruptcy generally is recognized as governed by state  
 law. Id. at 450-51. This is particularly true in  
 exception to discharge cases . . . where the litigation  
 ordinarily has no direct impact on the bankruptcy  
 estate.

8 Charlie Y., Inc. v. Carey (In re Carey), 446 B.R. 384, 390 (9th  
 9 Cir. BAP 2011), footnote omitted.

10 B. Standards Under California Law

11 California law permits recovery for attorney's  
 12 fees under two separate provisions. Section 1717  
 13 allows a party to recover attorney's fees incurred in  
 the litigation of a contract claim. . . . Section 1021  
 14 permits recovery of attorney's fees by agreement  
 between the parties, and does not limit recovery of  
 attorney's fees to actions on the contract. . . .  
 15 Attorney's fees for fraud claims may be recovered if  
 the contract so provides.

16 Terra Nova Indus. v. Chen (In re Chen), 345 B.R. 197, 200 (N.D.  
 17 Cal. 2006), citations and footnotes omitted.

18 The attorney's fee clause in the parties' contract need not  
 19 refer explicitly to actions for fraud in order for such actions  
 20 to be encompassed by it. Where, for example, the clause in a  
 21 contract for the purchase and sale of real property permitted  
 22 recovery of fees for "bring[ing] any suit . . . with respect to  
 23 the subject matter or enforcement of the Agreement," the clause  
 24 was broad enough to encompass the seller's attorney's fees  
 25 incurred in defending a claim that the seller failed to disclose  
 26 the presence of asbestos on the property. 3250 Wilshire  
 27 Boulevard Bldg. v. W. R. Grace & Co., 990 F.2d 487, 489 (9th Cir.  
 28

1 1993).<sup>2</sup>

2 The plaintiff quotes the applicable provision in the  
3 promissory note that provides for attorney's fees in this matter,  
4 and the defendants have not suggested that this adversary  
5 proceeding does not fall within the scope of the provision or  
6 that attorney's fees are not appropriately awarded under one or  
7 the other of California's fee-shifting statutes cited above.

8 Therefore, the only question before the court is the  
9 reasonableness of the fees requested. The party moving for an  
10 award of attorney's fees has the burden of proof. City of Colton  
11 v. Singletary, 206 Cal. App. 4th 751, 784 (May 30, 2012). The  
12 court is to begin with the lodestar figure; that is, the product  
13 of the number of hours reasonably spent and the reasonable hourly  
14 rate prevailing in the community for similar services. Christian  
15 Research Institute v. Alnor, 165 Cal. App. 4th 1315, 1321 (2008).

16  
17 2.

18 The language of this provision includes not only  
19 contract enforcement actions, but actions relating to  
20 the "subject matter" of the agreement. The subject  
21 matter of the agreement is obvious: the sale of the  
22 3250 Wilshire Boulevard property by MetLife to  
23 Wilshire. Wilshire's lawsuit claimed that MetLife  
24 violated various duties by failing to disclose, prior  
25 to the sale, the alleged fact that MetLife was  
divesting itself of the building because of its  
asbestos content. Such a lawsuit clearly relates to  
the "subject matter" of the Purchase and Sale  
Agreement, regardless of whether Wilshire's claims,  
strictly speaking, sounded in tort or contract.  
Accordingly, as the prevailing party, MetLife is  
entitled to attorney's fees and expenses for defending  
this action.

26 Id.; cf. Redwood Theaters, Inc. v. Davison (In re Davison), 289  
27 B.R. 716, 725 (9th Cir. 2003) [the plaintiff alleged fraud but  
28 "did not allege any breach of the Agreement or seek to enforce  
any rights under the Agreement."].

1 The court should consider "whether the case was overstaffed,  
2 how much time the attorneys spent on particular claims, and  
3 whether the hours were reasonably expended," Christian Research  
4 Institute, 165 Cal. App. 4th at 1320; inefficient or duplicative  
5 services are not to be compensated. Id. at 1321.

6 [A]scertaining the fee amount is left to the trial  
7 court's sound discretion. Trial judges are entrusted  
8 with this discretionary determination because they are  
in the best position to assess the value of the  
professional services rendered in their courts.

9 Id., citations omitted.

10 C. The Fees Requested in This Case

11 Applying these standards to the fees requested in this case,  
12 the court finds, first, that Counsel's hourly rates - \$245 and  
13 \$225 for the two partners and \$175 and \$150 for the two  
14 associates - are reasonable and well within prevailing rates in  
15 this community during the time in which the services were  
16 performed.

17 With that said, the court also finds that the case was  
18 overstaffed. What the court finds striking is that Counsel found  
19 it appropriate to utilize the services of two partners and two  
20 associates in this case.<sup>3</sup> While the legal and factual issues in  
21 the case were not ordinary or common, the court does not believe  
22 they were so complex as to require the services of four  
23 attorneys, each billing relatively large amounts of time.

24 / / /

25 \_\_\_\_\_  
26 3. The court recognizes that the lead partner on the case  
27 was likely to be and ultimately was a witness at the trial, and  
28 that Counsel thus had to have two attorneys at the trial itself.  
This does not explain why it was necessary or reasonable to  
utilize the services of three attorneys through the first ten  
months of the case, adding a fourth in the final months.

1 The court also finds that the allocation of services among  
2 these four attorneys resulted in some instances in unnecessary  
3 duplication of effort. For example, Counsel's time records  
4 reveal several instances of an associate preparing relatively  
5 simple documents, such as various stipulations and the three  
6 pretrial conference statements, and a partner reviewing and  
7 revising those documents. Although in some of these instances,  
8 the partner did not charge for his time, in others, he did. In  
9 the case of a motion for summary judgment, an associate did the  
10 bulk of the work, but his work was reviewed and revised by both  
11 partners.

12 In addition, in the court's view, the amount of time spent  
13 by Counsel on several of the documents filed with the court, such  
14 as the various stipulations, the amended complaint (14 hours),  
15 the three pretrial statements (22 hours), the trial brief/trial  
16 statement (13 hours not including associate's time), and the  
17 proposed findings of fact and conclusions of law (21 hours), was  
18 excessive. Many of these documents repeated information  
19 previously presented.

20 Further, the trial in this proceeding involved the issue of  
21 damages only, the issue of liability having been resolved in the  
22 plaintiff's favor by way of summary judgment. Between the time  
23 the court granted the motion for summary judgment on liability  
24 and the conclusion of the trial, Counsel billed at least \$44,000  
25 in attorney's fees - on the damages issue alone. Beginning in  
26 June 2011, ten months into the case, Counsel chose to assign  
27 preparation of a trial brief to an associate who had not  
28 previously worked on the case to prepare the trial brief, despite

1 the fact that two partners and another associate had already  
2 worked extensively on the case and presumably had developed a  
3 good deal of familiarity with the facts and the issues. It thus  
4 appears Counsel did not delegate work on the case in a prudent  
5 manner.

6 The time sheets indicate that the associate who had worked  
7 on the case previously did not work on it at all after March  
8 2011; the court recognizes the possibility that he had left the  
9 firm. But that would not explain why one of the two partners who  
10 had also been working on the case would not have been a more  
11 cost-effective choice. As it turned out, the new associate spent  
12 37 hours and billed \$6,545 for legal research, reviewing the  
13 file, and preparing memos to the lead partner on the case, all  
14 apparently in aid of the preparation of the trial brief, and the  
15 partners spent another 13.7 hours and billed another \$3,246 for  
16 legal research and preparation of the trial brief which, as had  
17 been ordered by the court, was only five pages long and contained  
18 almost no legal analysis or citations, focusing instead on the  
19 factual issues surrounding the amount of the plaintiff's damages.

20 The court recognizes that it sees only the tip of the  
21 iceberg in any given case, and is aware that many things play out  
22 behind the scenes. Further, fee motions are unavoidably reviewed  
23 in hindsight, and second-guessing a law firm's decisions as to  
24 both the allocation of its resources and the amount of time its  
25 attorneys ought reasonably to devote to a case is an undesirable  
26 task. Nevertheless, particularly as here, where the obligation  
27 for the requested fees is to be transferred to the non-prevailing  
28 party, the court must exercise its discretion and deny fees as

1 appropriate.

2       Thus, the court will award attorney's fees payable by the  
3 defendants to the plaintiff as follows. First, the court will  
4 deduct \$3,381 from the amount of attorney's fees requested, on  
5 account of the fees incurred in preparing a motion to file under  
6 seal unredacted versions of Counsel's time records. That motion  
7 was based on the contention that the substance of Counsel's  
8 billing records is protected by the attorney-client privilege  
9 and/or the work product rule.<sup>4</sup> A quick call to an attorney  
10 practicing regularly in this court would have informed Counsel  
11 that attorney billing statements submitted in support of fee  
12 applications are rarely, if ever, filed under seal, and are  
13 rarely filed with significant redactions, if any.

14       Deducting \$3,381 from the total attorney's fees requested,  
15 \$84,525.83, leaves \$81,144.83, of which the court will deduct 25%  
16 on account of its findings of overstaffing, unnecessary  
17 duplication of effort and time, inefficient allocation of  
18 resources, and excessive time billed, all as discussed above.<sup>5</sup>  
19 Thus, the fee award will be \$60,858.62 (\$81,144.83 - \$20,286.21).  
20 / / /

21 \_\_\_\_\_  
22       4. The motion was denied, with the proviso that Counsel  
23 should file redacted versions of the billing statements.

24       5. Attorney's fee awards proceeding from the lodestar  
25 calculation and then enhancing or reducing the total by an  
26 across-the-board percentage amount is acceptable under California  
27 law. See, e.g., Serrano v. Unruh, 32 Cal. 3d 621, 625, 639, 644  
28 (1982) [hours reduced by 20%]; City of Colton, 206 Cal. App. 4th  
at 786 [fees reduced by 50%]; Building a Better Redondo, Inc. v.  
City of Redondo Beach, 203 Cal. App. 4th 852, 872-73 (Jan. 25,  
2012) [applying a 25% upward multiplier]; Christian Research  
Institute, 165 Cal. App. 4th at 1323-29 [approving fees for 71  
hours out of more than 600 hours requested, citing overstaffing,  
duplicative and unnecessary work].



1 D. The Costs Requested in This Case

2 The court will award the plaintiff the amount of costs  
3 incurred in this case, as itemized in the plaintiff's Amended  
4 Bill of Costs, Ex. JLP-7 in support of the Motion, but will not  
5 award the requested expert witness fees, \$12,614.39. As a  
6 general rule, California law allowing an award of costs in favor  
7 of a prevailing party, Cal. Code Civ. Proc. § 1032(b), does not  
8 encompass fees of experts not ordered by the court. Cal. Code  
9 Civ. Proc. § 1033.5(b)(1).<sup>6</sup> The plaintiff cites Thrifty Payless,  
10 Inc. v. Mariners Mile Gateway, LLC, 185 Cal. App. 4th 1050, 1066  
11 (2010), in which the court awarded the prevailing party its  
12 expert witness fees. However, first, the weight of California  
13 case law is to the contrary. See Carwash of America-Po v.  
14 Windswept Ventures No. 1, 97 Cal. App. 4th 540, 543-44 (2002),  
15 and cases collected at p. 544.<sup>7</sup>

16 Second, the Thrifty Payless court awarded the prevailing  
17 party its expert witness fees based solely on the fact that the  
18 attorney's fee clause in the parties' contract specifically  
19 provided that the prevailing party would be entitled to  
20 "reasonable expenses," including "witness and expert fees." 185  
21 Cal. App. 4th at 1066. In the present case, by contrast, the  
22 attorney's fee clause in the promissory note covered "such sums  
23 as are incurred for attorneys' fees and associated legal  
24

---

25 6. Fees of expert witnesses ordered by the court are  
26 recoverable. Cal. Code Civ. Proc. § 1033.5(a)(8).

27 7. Similarly, under federal law, taxable costs include  
28 compensation of court appointed experts only. 28 U.S.C. §  
1920(3); see also Lovell v. Chandler, 303 F.3d 1039, 1058 (9th  
Cir. 2002).

1 expenses." The language does not refer to expert witness fees,  
2 and the court cannot conclude that the defendants intended the  
3 phrase "associated legal expenses" to obligate them for the  
4 plaintiff's expert witness fees despite contrary prevailing  
5 authority.

6 III. CONCLUSION

7 For the reasons set forth above, the Motion will be granted  
8 in part and the court will award the plaintiff, as the prevailing  
9 party herein, the sum of \$60,858.62 in attorney's fees and  
10 \$2,108.30 in costs. The court will issue an appropriate order.

11  
12 Dated: August 23 2012

  
13 \_\_\_\_\_  
14 DAVID E. RUSSELL  
15 United States Bankruptcy Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28